Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

COMMENTS OF THE CITY OF NEW YORK

The City of New York ('the City') submits these comments in response to the Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment in the above-captioned proceeding, which was released by the Commission on April 21, 2017 (the "Wireline Notice").

I Introduction

The City has actively, enthusiastically and continuously pursued the growth of innovative, competitive wireline communications services across our diverse communities for over thirty years, dating back well before the passage of the 1996 Telecommunications Act ("TCA"). From creative early franchise initiatives with pioneering competitive local exchange providers such as Teleport (since taken over by AT&T) and Metropolitan Fiber Systems (subsequently taken over by MCI, which in turn was taken over by Verizon) to the latest crop of communications infrastructure entrepreneurs seeking to serve New York's robust and growing economy, the City has worked closely with a wide range of entities to provide access to the City's rights-of-way for the installation of fiber optic lines and other communications facilities. For some years after the adoption of the TCA, an unfortunate level of confusion and uncertainty over the interpretation of 47 USC Section 253 (hereinafter, "253") led to disputes and litigation both here and across the country regarding access to public rights-of-way for the installation of telecommunications infrastructure. In recent years, as judicial consensus on these matters has developed, uncertainty and litigation on these matters has receded. Disappointingly, however, the Commission's issuance of the Wireline Notice now threatens to reanimate earlier levels of uncertainty and litigation by suggesting possible steps in this area by the Commission that go well beyond its authority.

II. Discussion

With respect to the questions asked by the Commission in the Wireline Notice regarding its authority under 253, the City emphasizes the following:

(1) Congress specifically and intentionally withheld from the Commission authority to act on matters regarding the rights-of-way management and compensation practices of local

governments under 253(c) –- such matters have always been handled, as they must be under 253, by the courts, not the Commission. Not only is the legislative history of 253(d) utterly unambiguous in documenting the intent of Congress to reserve matters arising from 253(c) to the courts and not the Commission, the text of 253 itself, with its glaring omission of any reference to 253(c) from the text of 253(d) cannot be rationally explained any other way.

(2) The Commission's express authority under 253(d) is to preempt laws, regulations or legal requirements in the event of a "violation" of 253(a) "to the extent necessary to correct such violation or inconsistency." As a generally applicable rule would not be tailored to preempt "to the extent necessary to correct" each prohibition or effective prohibition on the provision of a service, rules purporting to categorically preempt as violations of 253(a) types of state or local government laws, regulations or legal requirements would be beyond the Commission's authority as such would cut off the required tailoring of the remedy to suit the particular violation.

(3) Judicial consensus has developed that preemption under 253 requires a determination that an actual prohibition or effective prohibition on the provision of a telecommunications service, not the mere possibility of such, be shown. To show such prohibition or effective prohibition requires an inquiry into the actual circumstances of the particular case, not the kind of rule-based determination that the Wireline Notice indicates the Commission is considering.

For these reasons, such rulemaking would be clearly distinguishable from the rulemaking under 47 USC Section 332 ("332") found valid by the Supreme Court *in FCC v. City of Arlington* 133 S.Ct. 1863 (2013). 253, unlike 332, expressly describes in (d) how the Commission is to undertake its preemption authority. The fifth sentence of Paragraph 110 of the Wireline Notice[1] proposes to read 253(d) as if Congress intended that the narrowly-tailored procedure described in (d) is not mandatory on the Commission, but can simply be dispensed with whenever the Commission chooses to use preemption by rulemaking instead. If that were the case, why would Congress have bothered to create a narrowly-tailored process in the first place? Why not simply grant the Commission the authority to preempt? The Wireline Notice's suggested reading of 253(d) gives the existing language of (d) no substance, and thus violates a central canon of statutory interpretation. The fourth sentence of that same paragraph of the Wireline Notice[2] suggests another alternative that would also fail to support a rule-making process because each adjudicated violation of the rule would, pursuant to 253(d), need to be tailored not to a violation of the rule but to a violation (if it even exists) of 253(a), i.e., the prohibition or effective prohibition itself, as required by (d). In this regard, it is relevant to correct a misleadingly out-of-context quotation in Paragraph 100 of the Wireline Notice.

That paragraph in the Wireline Notice includes the following description of an Eighth Circuit opinion: "Section 253(c) provides another exception described by the Eighth Circuit as a 'safe harbor functioning as an affirmative defense' which 'limits the ability of state and local governments to regulate their rights-of-way or charge "fair and reasonable compensation."'" But here is what the Eighth Circuit said in context:

[1] "Can we read Section 253(d) as setting forth a non- mandatory procedural vehicle that is not implicated when adopting rules pursuant to Sections 253(a)-(c)?"

[2] "Would notice, comment, and adjudicatory action in a Commission proceeding to take enforcement action following a rule violation satisfy these procedural specifications?"

> We acknowledge that others disagree with our understanding of subsection (c)'s role in section 253. Level 3, in its amended complaint, correctly states that section 253(a) limits the ability of state and local governments to regulate, but then suggests that section 253(c) also limits the ability of state and local governments to regulate their rights-of-way or charge "fair and reasonable compensation." In a broad sense this may be true, but only if the challenged regulation violates section 253(a). Further, the Sixth Circuit, in *TCG Detroit v. City of Dearborn,* 206 F.3d 618, 624 (6th Cir.2000), found that the challenged fee did not violate section 253(a), and then, nonetheless, proceeded to analyze the fee under section 253(c), despite that section's clear role as an exception to section 253(a)'s general rule.
>
> We disagree with the approach taken by the Sixth Circuit because section 253(c) is not self-sustaining. The language of section 253(c) following the phrase "Nothing in this section affects" "derives meaning only through its relationship to (a)." *BellSouth Telecomms.,* 252 F.3d at 1187-88. Indeed, section 253(c), standing alone, "cannot form the basis of a cause of action against a state or local government." *Id.* at 1189. Thus, requiring proof of a violation of subsection (a) before moving to subsection (c) is the only interpretation supportable by a plain reading of the section as a whole.[3]

The proper context is crucial here, because the Eighth Circuit's point was precisely that a showing of an actual or effective prohibition is a necessary prerequisite to any finding of a 253 preemption. For the Commission to treat a rule violation as a basis for preemption when it might or might not constitute a prohibition or effective prohibition in the particular case would fail to meet the very test the Eighth Circuit was describing in the full quote the Wireline Notice misleadingly excerpts in Paragraph 100.

Paragraph 101 of the Wireline Notice includes yet another misleading quotation, this time from the statute itself. The Eighth Circuit opinion cited by the Wireline Notice in paragraph 100 expressly and correctly condemns this particular form of misleading quotation of 253(a). Paragraph 101 says "we seek comment below on a number of specific areas where we could utilize our authority under Section 253 to enact rules to prevent states and localities from enforcing laws that 'may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.'" But as the City has previously pointed out in an ex parte filing in response to an earlier draft of the Wireline Notice,[4] this kind of paraphrasing of 253(a) completely distorts the meaning of the provision by replacing the words that actually precede "may prohibit" in 253(a) with the kind of phrase the Wireline Notice here uses instead. As the Eighth Circuit opinion said: "By inserting the word 'that' before 'may,' . . .the most precise meaning of section 253(a) has been distorted."[5]

That the Wireline Notice quotation improperly distorts the meaning of 253(a) is relevant to the rulemaking issue, because a rule that is issued based on a determination that a type of local legal requirement might in some or even many or most cases lead to a prohibition or effective prohibition could only itself be a basis for preemption if the distorted

---

[3] *Level 3 v. City of St. Louis* 477 F.3d 528, 532 (8th Cir. 2007) ("*Level 3*").

[4] Letter from Michael Pastor, General Counsel, New York City Dept. of Information Technology and Telecommunications, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-3 (filed Apr. 12, 2017)

[5] *Level 3* 477 F.3d at 533.

version of (a) were what Congress enacted. The real, undistorted meaning of (a) as in fact enacted by Congress requires for 253(a) preemption a finding not that practice might or sometimes (or even often) does result in a prohibition or effective prohibition but rather of a showing of an actual prohibition or effective prohibition in each case. The Commission may consider this test inadequate as a policy matter to achieve certain of its policy goals, because it thinks the test too slow or cumbersome to prevent local practices it thinks may be retarding broadband buildout in some way. But such policy concerns, even if they were correct, cannot vitiate clear Congressional limits on the scope of preemption. Where, as here, Commission authority to preempt by rule is limited by statute, the Commission's recourse is to seek legislative changes from Congress, not to itself change the language of the statute.

The answer to the Wireline Notice inquiry in paragraph 102 about potential rules against moratoria is simply a subset of the general answer above. Moratoria can in some cases promote rather than prohibit or effectively prohibit the provision of a telecommunications service, for example by affording a local government the time to produce a considered and comprehensive approach to new or increasing demands on the right-of-way, rather than trying to deal with such demands in an ad hoc or haphazard manner that can itself result in claims of unfairness among competitors. As such, a moratorium can only be subject to possible preemption under 253 if it is found to be a prohibition or effective prohibition in context, not merely because it is inconsistent with a rule against moratoria.

Paragraph 108 of the Wireline Notice states that the "Commission has described Section 253(a) as preempting conduct by a locality that materially inhibits or limits the ability of a provider 'to compete in a fair and balanced legal and regulatory environment.'" The Wireline Notice then goes on to ask: "Is this the legal standard that should apply here?" The standard the Commission mentions here has been widely cited by courts dealing with 253 issues, and is capable of being an appropriate standard, but *only* if applied with full attention to *all* its aspects (and also only if it is recognized that it is still subject to the safe harbors of 253(b) and (c)). A full parsing of the phrase in its entirety, especially in the context in which the Commission originally used it[6] shows that it reflects that a material inhibition of or limitation on provision of a telecommunications service is *not* subject to preemption unless such also rises to the level described in the rest of the standard. Thus, for example, a particular regulation imposed generally on all providers may not, regardless of the burden involved, be subject to preemption under 253(a) under this standard because all providers subject to the regulation would be subject to a fair and balanced regulatory environment. In particular cases, differential application of a specific regulation or legal requirement may also be shown not to justify preemption under this standard, because other aspects of the legal and regulatory environment as a whole render such differential application consistent with a fair and balanced regulatory environment. The proper application of this standard requires a careful evaluation of the circumstances of each case. The deepest risk of citing the *California Payphone* standard is that it will be improperly whittled down and what remains will be displayed as if it were the whole, by replacing the prohibit or effectively prohibit language of the statute with a less demanding "materially inhibit or limit" standard. Unfortunately, the Wireline Notice does just that in the last sentence of paragraph 101: "In each case described below, we seek comment on whether the laws in question are inconsistent with Section

[6] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCB Pol. 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14209, para. 38 (1997) (*California Payphone*)

253(a)'s prohibition on local laws that inhibit provision of telecommunications service." That sentence represents a fundamental misstatement of 253(a). 253(a) does not bar laws that "inhibit" provision of telecommunications service, it bars laws that "prohibit" provision of telecommunications service, a very different standard.

This sort of attempt to re-write the legislation that Congress enacted, in a way that would reduce the authority of state and local governments as expressly recognized by Congress, demonstrates vividly why Congress did not entrust the Commission with the power to meddle in the rights-of-way management and compensation matters involved in 253(c), an observation that leads to the issues raised in Paragraphs 103 through 107 of the Wireline Notice. These paragraphs raise questions about potential Commission rules that would have the Commission setting preemption standards for local government rights-of-way terms and conditions and compensation. This entire enterprise goes beyond the scope of the Commission's authority for all of the reasons discussed above: Congress expressed its clear intention that the Commission is not the entity with jurisdiction over these matters. For example, the interpretation of the word "reasonable" in 253(c)'s reference to compensation is neither a 253(a) or a 253(b) question, so the clear Congressional intent that the Commission have no jurisdiction over 253(c) matters bars Commission involvement in that issue. And even if the Commission did have jurisdiction over the 253(c) question, preemption can only apply in circumstances in which a particular law, regulation or legal requirement is prohibiting or effectively prohibiting provision of a service. So, for example, a particular right-of-way compensation level could have a prohibitive effect in one jurisdiction but not in another. A particular methodology for calculating right-of-way compensation could have a prohibitive effect on Provider A but not on Provider B, while a different methodology could have opposite effects. These are matters that can only be resolved by an inquiry into the actual prohibitive effect in each case, not by rulemaking.

It is not a coincidence that despite many lawsuits regarding the scope of 47 USC Section 253 that have arisen over the past twenty years (though more in the early years after the 1996 Act), the Commission has never acted conclusively on any 253 matter implicating local rights-of-way management or compensation. 253(d) conspicuously omits 253(c) from its description of matters that are subject of Commission preemption, and the legislative history is abundantly clear that Congress intended that the courts, and not the Commission, have jurisdiction over matters implicating local management of rights-of-way. For the Commission to rule on what constitutes "fair and reasonable compensation" under 253(c), or otherwise determine the scope of 253(c), would be for the Commission to act squarely beyond the limits of its legislative authority as expressed in 253(d), limits that the Commission has understood and respected for many years.

III. Recommendation

In contrast to the criticisms above of the Commission's various suggestions or speculations about potential rules to ostensibly implement 253, the City endorses the concept of collaborative cooperation among the Commission, states and local governments, working together to develop voluntary, model approaches to issues raised by the use of telecommunications service facilities of public rights-of-way. The Broadband Deployment Advisory Committee (BDAC) can be a productive and useful resource in this respect, although it would better serve its purpose if it included additional local government representation. The City urges the Commission to pursue avenues of voluntary cooperation among industry representatives and federal, state and local leaders to advance wireline broadband

infrastructure deployment, in lieu of imposition of new federal rulemaking that would in any event be beyond the Commission's authority.

IV. Copper Retirement, Network Change and Discontinuance Issues

With respect to the issues raised in Paragraphs 56 to 99 of the Wireline Notice, the City has similar concerns to those of the NTIA regarding the effect of technology transition on state, local and federal government agencies with limited budget flexibility. The City urges the Commission to take all actions necessary to protect the ability of state, local and government agencies to continue to receive communications services in forms that accommodate the systems available to such agencies for periods that reflect public agency equipment replacement schedule cycles. Failure to do so may put at risk the ability of public safety agencies and other critical service providers to continue to offer the public appropriate protection and services.

Sincerely,

The City of New York

By: Bruce Regal, Senior Counsel, New York City Law Department